

Regency



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Folk Construction Company, Inc.

**File:** B-225560

**Date:** February 12, 1987

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### DIGEST

1. Agency decision to use negotiation procedures in lieu of sealed bidding procedures is justified where the basis for award reasonably includes technical considerations in addition to price-related factors.

2. Protest that agency's use of negotiation procedures for acquiring excavation work in lieu of sealed bidding procedures is unduly restrictive of competition because the excavation industry virtually always competes under sealed bidding procedures is denied where the legitimate needs of the agency reasonably dictated that a negotiated procurement be used and adequate competition was obtained.

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### DECISION

Folk Construction Company, Inc. protests the terms of request for proposals (RFP) No. DACA01-87-R-0015, issued by the Army Corps of Engineers, Mobile, Alabama, for the construction of helicopter stagefields at Fort Rucker, Alabama. Folk contends that the Army should have solicited sealed bids instead of competitive proposals for this requirement.

We deny the protest.

The construction project for the helicopter stagefields involves, among other things, in excess of 1 million cubic yards of excavation, paving, and the construction of associated support buildings and control towers. The RFP states that award will be made to the responsible offeror whose proposal is evaluated as the most advantageous to the government, technical, price, and other factors considered. In this connection, the RFP lists the following major evaluation criteria: 1) Technical Capabilities and Experience, including construction methodology, similar past experience, and scheduling; and 2) Organization and Personnel, including

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proposed organization, supervisory personnel, quality control management, and financial capacity. Further, the RFP states that cost or price will not be scored but will be evaluated through the use of price analysis.

Folk argues that under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304 (Supp. III 1985), and under the implementing regulations, sealed bidding is still the preferred method of procurement. Folk argues that the Army has complete, detailed and extensive specifications comprising two large volumes; that time permits the submission of sealed bids since the RFP itself allows 6 weeks for submission of proposals; that the technical information required by the RFP is "no different" than technical data required by any government solicitation; that the technical information required by the RFP can be obtained by the government through a pre-bid conference or pre-award survey under sealed bidding; that it is not necessary to conduct discussions because the construction project has no unusual or unique quality to it but rather is ordinary "cut and fill excavation" of not great magnitude that can be timely completed by "any responsible bidder"; and that the government can reasonably expect to receive numerous sealed bids. Moreover, Folk contends that even if use of a negotiated solicitation is legally unobjectionable, sealed bidding is still the most appropriate acquisition method under the circumstances.

In response, the Army states that the using agency requires completion of the work by April 1988, and that therefore the RFP requires the work (estimated by the Army to cost \$26 million) to be completed within 400 calendar days after receipt of the notice to proceed. The Army also states that failure to complete the work strictly on schedule will result in a 30 percent reduction in projected training of Army personnel at the base equivalent to a loss of student flight training at a rate of approximately 800 students per day. Additionally, the Army claims that any construction delay would also delay aerial gunnery and multi-track training within the Army's flight training curriculum. Accordingly, since timely completion of the project is critical to the Army and because of the magnitude of the project, the Army determined that evaluation of offerors' management, supervision, and subcontractor coordination was essential.

We do not think that the Army acted improperly. While CICA eliminated the former statutory preference for formally advertised procurements ("sealed bids"), the statute and the implementing regulations do provide specific criteria for determining whether a procurement should be conducted by the

use of sealed bids or competitive proposals. The Federal Acquisition Regulation (FAR), 48 C.F.R. § 6.401 (1986), provides for the use of sealed bidding if:

- "(1) Time permits the solicitation, submission, and evaluation of sealed bids;
- "(2) The award will be made on the basis of price and other price-related factors;
- "(3) It is not necessary to conduct discussions with the responding offerors about their bids; and
- "(4) There is a reasonable expectation of receiving more than one sealed bid."

One of the requirements for the use of sealed bids is that award will be made on the basis of price and other price-related factors. The basis for award here is not restricted to price-related factors alone. The Army, in addition to requesting prices, also seeks technical proposals containing specific technical data that will be measured against various technical criteria. Such a procurement clearly does not satisfy the requirements for the use of sealed bids. The protester, however, argues that the data the Army seeks for evaluation purposes is not so unique that it cannot be obtained during a preaward survey as part of a responsibility determination under sealed bidding procedures.

We do not agree that a preaward survey can be used as a substitute for negotiations, and a technical evaluation. A preaward survey is part of an agency's investigation of an offeror's responsibility which focuses on a prospective contractor's ability to meet minimum responsibility standards--such as adequate financial resources and a satisfactory performance record. See Pope, Evans and Robbins, Inc., B-200265, July 14, 1981, 81-1 CPD ¶ 29. In contrast, the focus of the negotiation process is a relative assessment of the merits of individual proposals, including an evaluation of matters that are traditional areas of responsibility. See SBD Computer Services Corp., B-186950, Dec. 21, 1976, 76-2 CPD ¶ 511. Thus, the Army here does not seek to determine whether a low bidder is minimally acceptable; rather, the Army is seeking one contractor among many responsible contractors that, on a comparative basis, is highly technically qualified. A preaward survey is not a proper vehicle for that kind of requirement.

Folk also argues that earthmoving requirements have traditionally been procured by sealed bidding by the Army and other agencies and that the protester is unfamiliar with negotiation techniques, including technical proposal submission, and is ill-equipped to compete under negotiation

procedures. Further, the protester, supported by a letter from a trade organization, argues that the industry as a whole is also ill-equipped to compete under negotiation procedures because the overwhelming majority of procurements of this type are conducted under sealed bid procedures. Folk also argues that the Army did not comply with CICA, 10 U.S.C. § 2305(a)(1)(C), which generally requires that the "type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs." According to Folk, the Army did not consider the nature of the market in choosing to conduct a negotiated procurement. Therefore, the protester concludes that the Army's use of negotiated procedures is unduly restrictive of competition.

We do not think that the Army unduly restricted competition by using negotiated procedures. The Army advises that 11 proposals were received in response to the RFP, including one from the protester, and there is no evidence in the record that adequate competition was not obtained by the Army despite the alleged lack of familiarity of the industry with negotiation techniques. In addition, Folk's lack of expertise and alleged inability to compete viably under the terms of the RFP is not a basis for us to conclude that the negotiated method of procurement is unduly restrictive of competition because the fact that a potential offeror is unable or unwilling to compete under the terms of a solicitation does not render a solicitation unduly restrictive if it represents the legitimate needs of the agency. See generally H.M. Sweeny Co., B-197302, June 12, 1980, 80-1 CPD ¶ 413. Also, the CICA provision (10 U.S.C. § 2305(a)(1)(C)) cited by Folk applies, by its terms, to specifications in a solicitation and not to the method of procurement chosen by an agency.

The protest is denied.



Harry R. Van Cleve  
General Counsel

